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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of )  
Video Description of )  
Video Programming )  
 )

MM Docket No. 99-339

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	1
ARGUMENT .....	3
I. THE COMMISSION HAS NO JURISDICTION TO IMPOSE VIDEO DESCRIPTION ON CABLE OPERATORS OR CABLE NETWORKS .....	3
A. Congress Did Not Give the FCC the Power to Adopt Video Description Rules .....	4
B. The FCC has No Authority to Adopt New Rules Affecting Cable Content .....	5
II. PROVIDING VIDEO DESCRIPTION RAISES SIGNIFICANT TECHNICAL ISSUES .....	7
A. Producing Video-Described Programming is Significantly More Complex And Costly than Closed Captioning .....	9
1. Video Description is a Time-Consuming Process .....	9
2. Producing Video-Described Programming is Costly .....	10
B. Distributing Video-Described Programming to Cable Customers Is Complex and Adds Other Costs .....	11
1. Cable Networks Would Be Forced to Add an Additional Audio Channel or Delete Existing Uses of An Existing Channel .....	12
a. Existing Cable Networks Generally Do Not Have Spare Audio Capacity .....	12
b. Creating Additional Network Audio Capacity Would Be a Costly Undertaking .....	14
c. Impact on Digital Compression .....	15
2. Cable Systems Would be Forced to Reconfigure Their Systems to Add A New Channel .....	15
a. Plant and Equipment .....	15
b. Converter boxes .....	17
III. VIDEO DESCRIPTION IS NOT SUITABLE FOR A WIDE VARIETY OF CABLE PROGRAMMING .....	17

IV. CABLE OPERATORS PROVIDE EMERGENCY INFORMATION FOR PERSONS WITH VISUAL DISABILITIES .....	20
CONCLUSION.....	22
ATTACHMENT A .....	23
ATTACHMENT B .....	24

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**COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION**

The National Cable Television Association ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators, cable program networks, equipment suppliers and others interested in or affiliated with the cable television industry.

**INTRODUCTION AND SUMMARY**

The cable industry fully supports the Commission's goal of increasing the accessibility of video programming for people with disabilities. Dozens of cable networks are offering programming with significant amounts of closed captioning. And Turner Classic Movies has participated in the early voluntary efforts to provide some cable network programming that is video-described.

The Notice seeks comment on whether the Commission should mandate the provision of video description. Video description is designed to assist persons with visual disabilities by inserting "narrated descriptions of a television program's key visual elements...during the natural pauses in the program's dialogue."<sup>1</sup> Video description is typically provided through the

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<sup>1</sup> Notice at ¶1.

use of the Secondary Audio Programming (“SAP”) channel so it is audible only to those wishing to hear the additional narration.<sup>2</sup>

The Notice proposes that broadcasters affiliated with ABC, CBS, Fox and NBC in Nielsen’s top 25 Designated Market Areas (“DMAs”) and “larger” multichannel video programming distributors (“MVPDs”) provide a minimum of 50 hours per calendar quarter (roughly four hours per week) of described prime time and/or children’s programming.<sup>3</sup> Larger MVPDs would be required to carry the described programming of the broadcasters affiliated with the top 4 networks, and of nonbroadcast networks that serve 50% or more of MVPD households.<sup>4</sup> The FCC’s proposed cut-off for requiring some video description of cable program networks is modeled on one aspect of its existing closed captioning rules, which imposes heightened captioning obligations on certain cable networks, among others, with respect to their provision of captions for live programming.<sup>5</sup>

Significant differences exist, though, between closed captioning and video description. Closed captioning is a widely used means of providing textual displays of information that has been around since the 1970’s. And there are well-established ways to deliver closed captioning information in analog signals, where it is embedded in line 21 of the Vertical Blanking Interval and automatically sent along with a video signal. Video description, in contrast, is still in its nascent stages. It was first tested in 1988, and used in a national program in 1990.<sup>6</sup>

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<sup>2</sup> Id.

<sup>3</sup> Notice at ¶20.

<sup>4</sup> Id. at ¶25 n. 64.

<sup>5</sup> 47 C.F.R. §79.1(e) provides that national cable networks serving at least 50 percent of all MVPD homes cannot count electronic newsroom captioning towards compliance with the captioning benchmarks. Rather, they must use live captioning.

<sup>6</sup> Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, 11 FCC Rcd 19214, 19254 (1996) (hereinafter “Video Description Report.”)

There is far less experience in creating and delivering video-described programming to cable customers. In contrast to the established method for delivering closed captioning, numerous changes would need to be made to the cable infrastructure to create an audio path to provide even a small amount of video-described programming to a single cable customer. Thus, significant obstacles to adopting mandates for video description remain, regardless of the size of the cable program network or the cable system that distributes it.

In the 1996 Act, Congress directed the Commission to issue a report on developments in this area. But it gave the Commission no authority to act further. Thus, while the Notice serves the important purpose of updating the Commission on video description, it is premature for the FCC to mandate this service.

## **ARGUMENT**

### **I. THE COMMISSION HAS NO JURISDICTION TO IMPOSE VIDEO DESCRIPTION ON CABLE OPERATORS OR CABLE NETWORKS**

The Notice seeks comment on whether the Commission “possess[es] statutory authority to adopt the above-proposed video description rules.” It also “seek[s] comment on the question whether the existence or relative strength of such authority varies according to the type of video programming provider – broadcaster, cable operator, or DBS company, for example – potentially subject to the rules.”<sup>7</sup> The Notice suggests a variety of possible jurisdictional theories upon which to base these rules. But this is not an area in which Congress has left the FCC room to act. Rather, Congress considered whether to give the FCC authority to adopt rules, and decided against it.

Even if Congress’ failure to include rulemaking authority were somehow viewed as not foreclosing the FCC’s ability to move beyond an inquiry on this topic, at least with respect to

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<sup>7</sup> Notice at ¶34.

regulation of the content of cable television, the Commission's powers are tightly circumscribed. The FCC has no authority to adopt rules that dictate the content of cable services.

**A. Congress Did Not Give the FCC the Power to Adopt Video Description Rules**

The Notice describes a variety of differing statutory provisions that address increasing accessibility of certain communications services for persons with disabilities.<sup>8</sup> And it purports to rely on these provisions as support for its rulemaking authority here. But Congress has not left the FCC with discretion in the area of video description. Section 713 of the 1996 Telecommunications Act specifically delineates the FCC's role.

In a subsection entitled "Video Descriptions Inquiry", Congress directed the Commission, within 6 months after the 1996 Act's enactment, to "commence an inquiry to examine the use of video descriptions on video programming in order to ensure the accessibility of video programming to persons with visual impairments, and report to Congress on its findings."<sup>9</sup> Significantly, nothing in this provision grants the FCC power to adopt rules – it merely directs the FCC to undertake an inquiry and to send Congress a report. That the Commission has already done.<sup>10</sup>

The absence of rulemaking authority was intentional, not accidental. Indeed, the House of Representatives adopted a bill that would have expressly permitted the Commission, after completing its inquiry, to "adopt regulations it deems necessary to promote the accessibility of

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<sup>8</sup> Notice at ¶36.

<sup>9</sup> 47 U.S.C. §613(f) (emphasis supplied.) The FCC's report "shall assess appropriate methods and schedules for phasing video description into the marketplace, technical and quality standards for video descriptions, a definition of programming for which video descriptions would apply, and other technical and legal issues that the Commission deems appropriate."

<sup>10</sup> Video Description Report, 11 FCC Rcd. at 19270-71.

video programming to persons with visual impairments.”<sup>11</sup> The Senate bill gave the FCC no such authority. And in conference, “the agreement delete[d] the House provision referencing a Commission rulemaking with respect to video description.”<sup>12</sup> Congress’ deliberate removal of rulemaking power precludes the Commission from now interpreting its general governing statute to provide it with discretion to do the same thing.<sup>13</sup>

This contrasts with Congress’ action with respect to closed captioning, also found in Section 713. Congress directed the Commission to “prescribe such regulations as are necessary to implement” the closed captioning provisions of the section, including “regulations [that] shall ensure that video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captioning....”<sup>14</sup> The inclusion of rulemaking power with respect to closed captioning, and its absence from the same section addressing video description, is further evidence of Congress’ intent not to grant the Commission authority to adopt rules here. This is simply not a situation, then, where Congress has left the Commission with any discretion to adopt video description rules on its own.

#### **B. The FCC has No Authority to Adopt New Rules Affecting Cable Content**

Absent this express authority, the Commission has no implied or residual authority to adopt rules governing the content of cable television programming. Section 624(f) of the Communications Act provides that “any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly

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<sup>11</sup> H.R. 1555, Sec. 204(f).

<sup>12</sup> H.R. Conf. Rep. No. 458, 104<sup>th</sup> Cong., 2d Sess. 184 (1996) (emphasis supplied.)

<sup>13</sup> *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 442-43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.”) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting.))



provided in this title.”<sup>15</sup> Any newly created requirement to provide video description would run afoul of this provision because it would affect the content of the cable service offered to customers in several ways.

Mandating that programming contain video descriptions would require cable program networks to modify the sound track that they otherwise would choose to provide, forcing them to include dialogue in a program where it otherwise would be silent or to provide audio content different from that which the programmer otherwise would offer in the alternative audio channel.<sup>16</sup> It also would impact the content of the package of services offered by a cable operator to its customers by interfering with an operator’s free choice of which services to provide. The rules effectively would force an operator to carry certain program services only if they carried a specified amount of described programming – an obligation that affects content directly. There is no express provision of Title VI of the Communications Act that imposes this cable content requirement – or a provision anywhere else in the Act that would authorize the Commission to do so.

Section 624(f) is fully consistent with the constitutional limitation that prevents the government from intruding into content decisions made by cable television operators and programmers. Any such intrusion would be suspect under the First Amendment, which “guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what not to say.”<sup>17</sup> Any governmental requirement to describe video programming would

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<sup>14</sup> 47 U.S.C. §612(b)(1).

<sup>15</sup> 47 U.S.C. §544(f)(1). “Cable service” is defined as the “(A) one-way transmission to subscribers of (i) video programming or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection and use of such video programming or other programming service.” 47 U.S.C. §522(6).

<sup>16</sup> Riley v. National Federation of the Blind, 487 U.S. 781, 795 (1988) (“Mandating speech that a speaker would not otherwise make necessarily alters the content of that speech.”)

<sup>17</sup> Id. at 796-97.

thus raise serious First Amendment issues. Accordingly, even if Congress' intent were at all ambiguous, the FCC should narrowly interpret its statutory mission so as to avoid raising "grave doubts" about the constitutionality of its governing statute.<sup>18</sup>

## **II. PROVIDING VIDEO DESCRIPTION RAISES SIGNIFICANT TECHNICAL ISSUES**

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The Notice proposes that "the largest video programming distributors should provide a limited amount of video description of their prime time and/or children's programming."<sup>19</sup> The proposal with respect to the cable industry is somewhat ambiguous. The Notice at one point suggests that "larger MVPDs would be required to carry the described programming of the broadcasters affiliated with the top 4 networks, and of nonbroadcast networks that reach 50% or more of the MVPD households."<sup>20</sup> And the Notice suggests that cable operators would be responsible for compliance with the rules, although it "acknowledge[s] and expect[s] that programming networks, and not broadcast stations and MVPDs, will actually describe programming...."<sup>21</sup> At another point, the Notice proposes that distributors, such as cable operators, "should initially provide a minimum of 50 hours per quarter (roughly four hours per week) of video description of prime time and/or children's programming."<sup>22</sup>

It is not clear from the Notice exactly how the Commission anticipates that this rule would work in practice – for example, whether compliance with the fifty hours per quarter obligation would be measured across the entirety of the cable system's program offerings, or whether each program network that a cable system carries of a particular size would be required

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<sup>18</sup> See generally United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

<sup>19</sup> Notice at ¶19.

<sup>20</sup> Id. at ¶20.

<sup>21</sup> Id. at ¶¶23, 24.

<sup>22</sup> Id. at ¶29.

to offer the prescribed amount of video programming. Regardless, even assuming, arguendo, that the FCC has authority to adopt any rules, it should refrain from doing so for a variety of technical and operational reasons.

In its 1996 Report to Congress, the Commission acknowledged that there were technical barriers to video description. In particular, the FCC's Inquiry demonstrated "the unavailability of the SAP channel or the inability of some broadcaster and cable networks to distribute programming with the SAP channel."<sup>23</sup> For that reason, among others, the Report explained that "any schedule for the full deployment of video description is dependent, in part, on the implementation of advanced digital technologies."<sup>24</sup> As recently as 1998, the FCC reported to Congress that "the appropriate timeframe for any requirements might take into account DTV penetration and availability."<sup>25</sup>

The Notice in this proceeding gives short shrift to these findings. Instead, it proposes to proceed to adopt video description rules and implement them in an analog environment, eighteen months after a rule is adopted.<sup>26</sup> The difficulties already identified by the Commission in providing this service in the analog world, though, remain the same today. They include the costs needed to produce video-described programming as well as the expenses and efforts needed to overcome technical and operational problems in delivering this programming to cable customers.

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<sup>23</sup> Video Description Report, 11 FCC Rcd. at 19262.

<sup>24</sup> Id. at 19270.

<sup>25</sup> Fourth Annual Report on the Status of Competition in the Market for Delivery of Video Programming, CS Docket No. 97-141 at ¶268 (rel. Jan. 13, 1998) (hereinafter "1997 Competition Report.")

<sup>26</sup> Notice at ¶27.

**A. Producing Video-Described Programming is Significantly More Complex And Costly than Closed Captioning**

Creating video-described programming requires a much different process than closed captioning. It is not simply, as in the case of captioning, creation of a verbatim transcript of material that already is being spoken. Differences in the creation and transmission of video description result in significantly higher costs and technical difficulties.

**1. Video Description is a Time-Consuming Process**

Video description entails creation of an entirely new script to complement the script created by the writer of the original program. Because this text fills in details of visual elements of an already-produced program, it involves subjective, creative work: deciding which scenes to describe and what elements of the scene warrant description. Moreover, it involves choices regarding the appropriate speaker to read the newly-written material. The Commission has previously recognized that “the development and production of this second script can add considerably to both the production time and the budget required to produce a program.”<sup>27</sup>

All these steps take time – and there frequently is not a long lead-time between program delivery to the cable network and airtime. In fact, in many cases, cable networks do not obtain tapes of their programming until a few days before airing. Moreover, descriptive video, in today’s analog world, must be re-mixed at the network level into the program sound so that the entire audio track is audible only to those wishing to use the service – and is inaudible to those not using the SAP channel on their television sets.<sup>28</sup> Given the need to view the program, create a second script, obtain narrators and re-mix the audio track, producing video description would conflict with airdates for many types of programming.

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<sup>27</sup> Video Description Report, 11 FCC Rcd at 19262-63.

## **2. Producing Video-Described Programming is Costly**

It is difficult to accurately estimate the costs of all these steps required to produce video description for several reasons. The Notice mentions only one vendor of “closed” descriptive video services.<sup>29</sup> Relatively few people are trained to offer it. In fact, at the time the Commission first issued this Notice, WGBH’s website explained that its production schedule had slowed due to the lack of available personnel.<sup>30</sup> Clearly, the experimental nature of this service makes it difficult to predict future costs or the capacity to produce video-described programming on the much wider scale that is contemplated by the FCC’s Notice.

What is known is that describing programming today can be quite expensive. The Commission previously explained that “the service is labor intensive and the actual costs seem to vary considerably depending on the particular project.”<sup>31</sup> And it concluded that “the costs of providing video description are substantial.”<sup>32</sup> Whether the correct number is \$3,400 per program hour, as the FCC has reported,<sup>33</sup> or a higher amount, the fact remains that descriptive video program production costs are several multiples of the cost of closed captioning (which range from \$300 to \$2,500 an hour).<sup>34</sup> Even taking the FCC’s estimate, the production cost alone for obtaining a year’s worth (4 hours weekly) of video-described programming would exceed \$700,000 for each cable network. This does not include expenses that each network would incur

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<sup>28</sup> See generally “Issues to Be Addressed in a Possible Requirement for Video Description of Video Programming, a Report from the WGBH Educational Foundation” (Nov. 5, 1998), filed Nov. 14, 1999 at 9 (hereinafter “WGBH Report”).

<sup>29</sup> Notice at ¶15 (WGBH Descriptive Video Services).

<sup>30</sup> In November 1999, WGBH’s website announced that “there will be a delay in the availability of some television programming and home video with DVS due to recent staff turnover and an increased volume of other DVS production activity. The department is focusing much of its energy this fall to training new staff to handle the increase in described programming.” <<http://www.wgbh.org/wgbh/access/dvs/dvsguide.html>>

<sup>31</sup> Video Description Report at 19258.

<sup>32</sup> 1997 Competition Report at ¶269.

<sup>33</sup> Id.

to re-mix the video description with the program's audio sound track. And it does not take into account the additional costs needed to expand production facilities for networks whose programming might necessitate in-house video description capabilities. Indeed, one cable program network estimates that these costs would approach \$2 million.

These estimates of descriptive video costs are presumably based on costs incurred today – costs that may escalate initially. The shortage of trained personnel at this time suggests that demand will far exceed supply if rules are adopted. And significant questions remain about whether the creation of an additional script constitutes a derivative work under copyright law, which could not be created without the permission of, and license from, the copyright owner.<sup>35</sup> Even assuming a license could be obtained, this could also impact descriptive video costs.

**B. Distributing Video-Described Programming to Cable Customers Is Complex and Adds Other Costs**

The Notice mainly focuses on the costs of producing video-described programming.<sup>36</sup> But requiring any amount of video-described programming to be shown by cable networks and retransmitted by cable operators would lead to many additional technical issues and associated costs. In the primarily analog cable industry of today, distribution of video-described programming would require the vast majority of cable networks to create an entirely new audio channel – or to cease using an existing audio channel for the purposes for which it is currently employed. And it would require cable operators to reconfigure their systems and to purchase certain equipment for each channel of programming that carries a video description track.

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<sup>34</sup> Video Description Report, 11 FCC Rcd at 19233.

<sup>35</sup> See generally Nimmer on Copyright, §3.06 at 3-34.4 (“If [the underlying work] is protected by copyright, then its unauthorized incorporation of a derivative or collective work will constitute an act of copyright infringement.”) (footnotes omitted.) A “derivative work” is “[a] contribution of original material to a pre-existing work so as to recast, transform or adapt the pre-existing work.” *Id.* at §3.03 at 3-9.

<sup>36</sup> Notice at ¶26.

**1. Cable Networks Would Be Forced to Add an Additional Audio Channel or Delete Existing Uses of An Existing Channel**

The cable networks identified by the Notice as potentially subject to new rules – those that serve 50 percent or more of multichannel video programming distributor (“MVPD”) households -- do not provide video description.<sup>37</sup> A survey of those networks reveals that a requirement to do so would entail substantial changes in the way they currently provide audio to cable systems.

**a. Existing Cable Networks Generally Do Not Have Spare Audio Capacity**

The majority of the top cable networks provide only two channels of audio, both of which are in use today. In many cases, these two audio channels are used to provide stereo sound: one channel is used for left audio, and the other is used for right audio. In other cases, cable networks transmit in monaural, but still use both channels for primary and redundant audio. Thus, most cable networks simply do not have a third audio channel for any use, including video description.

Some cable networks do have a third channel, though, which is used for a variety of purposes.<sup>38</sup> In several cases, a third audio track is used to transmit additional language services for both domestic and international audiences. Several cable networks potentially subject to the new rules – including TNT, the Cartoon Network, USA Network, ESPN, FX and American Movie Classics – use an additional audio track to transmit some Spanish language programming

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<sup>37</sup> The FCC’s most recent Competition Report estimates that 80.9 million households subscribe to multichannel video programming services as of June 1999. Sixth Annual Report, CS Docket No. 99-230 at ¶6 (rel. Jan. 14, 2000). A list of networks that reach 40.45 million or more MVPD households is provided as Attachment A.

<sup>38</sup> A few cable networks may have more than three audio channels. These additional channels may be used for other purposes.

on a regular or occasional basis. Others are contemplating adding this service to serve the Spanish-speaking population of over 17 million.<sup>39</sup>

The preponderance of Spanish language programming is available during prime time, when the largest Spanish-speaking audiences are watching – the same time that the Notice proposes for much of the video-described programming. When the additional audio tracks are not being used for this additional language service, some networks send information over this same channel to alert cable customers to the fact that there is no additional language service being provided at that time. This additional information is provided to minimize confusion and service calls to cable operators that otherwise would arise when customers are tuned to a channel on which they would hear no audio accompanying the video.

Some networks use a third audio channel for providing supplementary audio information – for example, local weather information or world news.<sup>40</sup> And it also may be used to provide enhanced television commentary – such as commentary from a movie’s director – related to a program being aired.

In other cases, cable networks use a third audio channel to transmit “cue tones” – signals inaudible to cable customers that alert equipment at the cable headend to a break in national programming in which a local cable operator may insert local advertising. Other networks may use it to signal that a program must be blacked out by the operator.

In short, our survey shows that those cable networks with a third audio channel provide a variety of different services on that capacity. Imposing a video description obligation would require these program networks to sacrifice or alter their existing uses of an audio channel, such

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<sup>39</sup> 1990 U.S. Census, Table 4: “Languages Spoken at Home by Persons 5 Years and Over.”

<sup>40</sup> For example, C-SPAN carries BBC World Service and World Radio Network on its third audio track.



as Spanish language, news and weather information, or information used for local advertising insertion.

**b. Creating Additional Network Audio Capacity  
Would Be a Costly Undertaking**

Considerable technical issues surround creating new audio capacity to provide video description. Reconfiguring a two-channel<sup>41</sup> or three-channel cable network to build an additional audio track would be a complex undertaking in this analog environment.

Almost all the most widely-distributed cable networks are configured for a two-channel playback. Numerous hardware changes – either upgrading existing equipment to three channel capacity, if possible, or replacing existing two channel equipment – would be necessary, even to provide a few hours of descriptive video every week.

For example, many networks would need to replace their playback devices, including video tape players or video file servers. This equipment needs to support the number of audio channels put out by the network – and since most networks only provide two audio channels, their output today would only be two channels. If a network uses a back-up system, that too would have to be replaced or upgraded. Hardware adjustments would also need to be made in order to transmit the programming output from the tape machine to the point where it is uplinked to a satellite transponder. Similar equipment changes typically also would need to be made to the master control switch and to routers. In addition, cable networks would need to add, upgrade or replace an audio processor, which would be necessary to monitor the transmission of the descriptive video service and to ensure its proper function. Two-channel networks may also need to install fiber gear and transmitters to transport the additional audio signal to the uplink

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<sup>41</sup> Even if one of the two existing audio channels theoretically could be used to transmit descriptive video, equipment at the receiving end would be required to take that channel and convert it to a SAP channel; otherwise

facility. Depending on the particular network, other hardware adjustments might also need to be made.

The costs of upgrading or replacing equipment would be considerable. Estimates range from \$100,000 to more than \$200,000 per network.

**c. Impact on Digital Compression**

Additional technical issues arise with respect to the transmission of some analog cable networks using digital compression. As one example, HITS is an uplink service provider that digitally compresses a variety of cable networks prior to their transmission to cable headends. In order to provide cable systems with a high quality signal at the same time that it maximizes the number of program networks that can be transmitted through compression, HITS can offer as many as a dozen cable networks for every 6 MHz of spectrum. If video description were added to the mix, it would reduce the amount of spectrum available for transmitting cable networks – or could degrade the picture quality of networks that HITS transmits. A wide-scale video description obligation could thus result in all cable customers with digital tiers receiving fewer digital networks with lesser picture quality.

**2. Cable Systems Would be Forced to Reconfigure Their Systems to Add A New Channel**

**a. Plant and Equipment**

The Notice reports that, according to the National Center for Accessible Media, 69 percent of cable systems in the top 50 MSAs are “SAP-equipped.”<sup>42</sup> Based on our research, that figure both significantly over-states existing SAP capability and understates the changes

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all cable customers – rather than just those that choose to hear the additional script – would hear the video description along with the remainder of the sound accompanying a program.

<sup>42</sup> Notice at ¶11.

necessary to provide cable customers with video description of cable networks serving 50 percent or more of the MVPD households.

Even if 69 percent of cable systems in the top 50 MSAs were to have some SAP capability, that does not mean that they could provide descriptive video services on all the 40 or so cable program networks serving more than 50 percent of the MVPD households. Rather, each channel would need to be SAP-equipped in order to do so. Our research suggests that between 5 and 15 percent of cable channels today may be capable of supporting the delivery of SAP, and that capacity is likely already being used.

The number of SAP-capable channels differs significantly from system to system, as does the nature and cost of equipment an operator would need to deliver SAP. Some channels may already have a Broadcast Television Systems Committee (BTSC) stereo generator with SAP capability. But most channels would not be so equipped.

There are several reasons why this would be the case. In many instances, cable networks do not transmit in stereo. And even if a network does transmit in stereo, that does not necessarily mean that a cable operator provides that network to its customers in stereo. Instead, an operator might still provide a single monaural channel (stereo summed at the headend) to its customers. In neither case would an operator have acquired a BTSC stereo generator for that channel – the essential piece of equipment necessary to provide a SAP channel. And, even if an operator has a BTSC stereo generator, it may not have one with SAP capability.

Obtaining a BTSC stereo generator with SAP capability would cost operators approximately \$1500 - \$2000 per cable channel; adding SAP capability to an existing BTSC stereo generator costs an additional \$200 - \$400. That translates into about \$20 million for the more than 10,000 cable systems nationwide to provide any video description for just a single

monaural cable network – or nearly \$80,000 per system if the FCC were to require systems to carry descriptive video provided by 40 cable networks.<sup>43</sup>

Other equipment changes may also be necessary for each channel. An operator may have to upgrade satellite receivers, or add additional decoders or other audio processing capabilities (at a cost of \$750 to \$1200 per channel).

**b. Converter boxes**

While many analog set-top boxes will pass through video description, that is not true of older models which contain volume control in the set-top box. Moreover, redesigning digital set-top boxes may be necessary in order to provide video description in a “user-friendly” way. For example, digital set-top boxes today provide program guide menus in Spanish when the SAP is selected by a user, since Spanish language is the primary use of the SAP today.

**III. VIDEO DESCRIPTION IS NOT SUITABLE FOR A WIDE VARIETY OF CABLE PROGRAMMING**

As described above, the Notice does not specifically delineate those cable networks to which the video description obligation would apply. But referencing the closed captioning rules for cable networks as the model for its cut-off point suggests that more than three dozen cable networks might be subject to this requirement.

Potentially applying video description obligations to this wide array of cable networks raises many questions. First of all, the affected cable networks have individual viewership during prime time that is well below that of the four over-the-air broadcast networks to which the FCC proposes to apply video description requirements. And, in fact, the Commission’s proposal

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<sup>43</sup> Other issues arise with the respect to the retransmission by cable of over-the-air television broadcast signals containing DVS. Where operators simply pass through broadcast signals, the associated descriptive video ordinarily would also be passed through, if technically feasible. See 47 U.S.C. §534(b)(3). But there are situations in which technical problems will arise that can only be addressed through acquiring additional equipment.

excludes over-the-air broadcast networks, such as WB and UPN, whose prime time ratings exceed the equivalent ratings of all the cable networks the rules would potentially cover.<sup>44</sup> If the Commission's goal is to ensure that the maximum number of viewers can gain some programming with described video, then the ratings information reveals that individual cable networks do not achieve comparability with the top four over-the-air broadcast networks.

Aside from an examination of ratings data, even a cursory review of the top 40 cable networks reveals that video description, even if it were technically achievable at a reasonable cost, is unsuitable for the wide diversity of cable programming offered.

For example, much of the programming aired by the top cable networks during prime time is live or a tape-delayed version of a live event.<sup>45</sup> This programming presents unique difficulties in video description. There is no opportunity to create a script in advance; a video description obligation would require these networks to hire additional personnel and create room for a person to provide a simultaneous description while the action is occurring. Yet, for live programming and other programming primarily aural in nature, much descriptive information is already available. In the case of sports, this information already is available in play-by-play announcing. For other live programming, the dialogue often includes a full description of essential information about, for example, news, weather, or products.<sup>46</sup>

A large group of other cable program networks primarily rely on preexisting syndicated movies and series for significant parts of their program day. As licensees of the programming,

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<sup>44</sup> According to recent data from A. C. Nielsen's Galaxy rating service, WB and UPN network programming each garnered a 2.7 rating during prime time for the 1999-2000 television season (September 20, 1999 through February 6, 2000.) These ratings exceed the average prime time ratings received by each of the individual cable networks that potentially would be covered by an FCC rule.

<sup>45</sup> Seven out of the 20 largest cable networks provide primarily live or tape-delayed programming during prime time. Attachment B lists a sampling of prime time programming presented by those networks.

there is considerable doubt whether they would have the right to add video description to an existing sound track.<sup>46</sup> But even if doing so would not be a copyright infringement or would not run afoul of contractual prohibitions, it would make little economic sense for a licensee to incur the costs of doing so, where a licensee could not recoup the costs of video description from subsequent airings of the program.

Yet a cable program network that did not offer original programming fare for which it included video description, or did not video describe previously produced programming, would face serious obstacles to satisfying any FCC obligation. If it were required to provide four hours of video-described programming weekly, such a cable network would be forced to choose from a highly limited selection of program offerings that already contain video description – assuming that the video-described version is even made available to subsequent licensees. That would seriously interfere with program options. Unlike the area of closed captioning, in which government funding over the course of decades had helped facilitate a storehouse of captioned programming, hardly any product exists today that contains video description.

Another sizable group of cable networks provide music programming for which video description seems highly inappropriate. It is, in fact, difficult to envision how a separate audio commentary could be included without seriously detracting from the musical performance itself. This type of programming typically lacks the natural pauses in which descriptive video could be inserted.

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<sup>46</sup> Indeed, the FCC itself acknowledged, in its 1996 Report to Congress, that “lower priority for video description should be given to programming that is primarily aural in nature, including newscasts and sports events.” Video Description Report, 11 FCC Rcd. at 19270.

<sup>47</sup> For example, if creation of a video-described version of a program were a derivative work under the copyright laws, then it would infringe the rights of the copyright owner of the underlying work.

In short, cable programming networks will continue to experiment with providing video description. But there are a variety of reasons why video description should not be mandatory for cable networks at this point. The costs of video description, the technical and operational difficulties that such an obligation would cause, and the inappropriateness of video description for a wide variety of cable programming, all caution against adopting rules at this time.

#### **IV. CABLE OPERATORS PROVIDE EMERGENCY INFORMATION FOR PERSONS WITH VISUAL DISABILITIES**

Finally, the Notice comments on the “vital importance for [public safety] emergency announcements to be accessible to persons with visual disabilities.”<sup>48</sup> And it seeks comment on a proposal that an aural tone be required to accompany emergency messages to alert persons with visual disabilities to turn on the radio, the SAP channel or a designated digital channel.<sup>49</sup>

Many cable operators already provide emergency announcements in both an audio and video format. By October 1, 2002, all cable operators will provide audio emergency information. The Emergency Alerting System (“EAS”) rules provide that all operators with systems serving more than 5,000 customers must have equipment that enables them to provide an audio and video EAS message on all programmed channels.<sup>50</sup> Systems serving fewer than 5,000 customers have a somewhat different obligation, in recognition of their lessened ability to absorb the hardware costs. They must either provide the national-level EAS audio message on all programmed channels, or install EAS equipment capable of providing the audio alert message on all programmed channels, and the audio and video EAS message on one programmed channel.

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<sup>48</sup> Notice at ¶32.

<sup>49</sup> Id.

<sup>50</sup> 47 C.F.R. §11.11. Systems serving 10,000 or more customers per headend have offered this EAS messaging since December 31, 1998. Systems serving 5,000 to 10,000 customers per headend are subject to this rule effective October 1, 2002.

In short, all cable operators must transmit emergency announcements that are accessible to persons with visual disabilities.

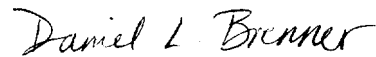


## CONCLUSION

In 1996, Congress directed the Commission to study the video marketplace to see whether conditions were ripe for video description. The Commission four years ago concluded that video description posed serious challenges in the analog world of today. As our Comments demonstrate, significant operational and technical obstacles still exist to providing even limited amounts of video-described programming. Video description would also conflict with existing and planned uses of audio channels by cable networks today, and would require cable operators to incur costs for each channel of video-described cable programming that they offered to customers.

Given the high costs and complexities in providing video description in today's analog world, Congress was correct in withholding authority for the Commission to go ahead with rules at this time. Technological developments in the future may well provide additional solutions, making easier the provision of video description and avoiding conflicts with the existing uses of audio channels by cable networks.

Respectfully submitted,



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## ATTACHMENT A

TBS  
DISCOVERY  
CNN  
USA  
ESPN  
TNT  
C-SPAN  
NICKELODEON  
A&E  
FOX FAMILY  
TNN – THE NASHVILLE NETWORK  
LIFETIME  
WEATHER CHANNEL  
MTV  
HEADLINE NEWS  
QVC  
THE LEARNING CHANNEL  
AMC  
CNBC  
VH1  
ESPN2  
COMEDY CENTRAL  
HISTORY CHANNEL  
E!  
CARTOON NETWORK  
HSN  
SCI-FI  
BET  
HGTV  
C-SPAN 2  
DISNEY  
TV GUIDE  
ANIMAL PLANET  
MSNBC  
WGN-C  
FX  
FOOD NETWORK  
FOX NEWS  
TV LAND  
BRAVO

## **ATTACHMENT B**

### **TYPICAL WEEKDAY NIGHT PRIME TIME PROGRAMMING ON PRIMARILY LIVE CABLE NETWORKS**

#### **C-SPAN**

8pm – Hacking of Internet Sites – FBI News Conference  
8:37pm – Bush Campaign Rally  
9:41pm – McCain Town Hall Meeting

#### **ESPN**

8pm – College Basketball: North Carolina at North Carolina State (continued)  
College Basketball: Seton Hall at Rutgers

#### **CNN**

8pm – World Today  
9pm – Larry King Live  
10pm – CNN NewsStand

#### **THE WEATHER CHANNEL**

8pm – Weather Center PM  
8:10pm – Travel Wise  
8:18pm – Local Forecast  
8:20pm – Weekly Planner  
8:28pm – Local Forecast  
8:30pm – Weather Center PM  
8:40pm – Travel Wise  
8:48pm – Local Forecast  
8:50pm – Storm Watch  
8:58pm – Local Forecast

#### **HEADLINE NEWS**

8-11pm – Continuous news coverage

#### **QVC**

8-11pm – Gold Rush

#### **CNBC**

8pm – Hardball with Chris Matthews  
9pm – Rivera Live  
10pm – News